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TABLE OF CASES AND LEGAL AUTHORITY

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Johnson v. Denton Construction Company, 911 S.W.2d 287 (Mo.banc 1995)

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JURISDICTIONAL STATEMENT

This is an appeal of an Award of workers= compensation benefits issued by the Labor and Industrial Relations Commission. The Appellant National Fabco Manufacturing, Inc. (hereinafter ANational Fabco@) timely appealed to the Court of Appeals, Eastern District. This case was properly appealed within the general jurisdiction of the Court of Appeals pursuant to MO. CONST. ART V., Subsection 3. This occupational disease occurred in the city of St. Louis, Missouri. Therefore this case was appealable to the Missouri Court of Appeals, Eastern District pursuant to Section 287.495.1 RSMO (1994). The Court of Appeals affirmed the Commission=s Award. An Order of Transfer to the Missouri Supreme Court was issued in this case by the Court of Appeals, Eastern District on January 11, 2001 pursuant to Rule 83.02 upon Appellant=s Motion for Rehearing and Alternative Application for Transfer.

The Missouri Supreme Court has jurisdiction over this matter under Article V, Section 10 of the Missouri Constitution and Rule 83.02 of the Missouri Rules of Civil Procedure.

PROCEDURAL HISTORY

A final hearing in this proceeding was held on January 19, 2000 before the Division of Workers' Compensation, the Honorable John H. Percy presiding. The issues to be resolved in this proceeding were the statute of limitations, occupational disease, notice, medical causation, nature and extent of permanent disability and future medical.

On April 25, 2000 the Administrative Law Judge awarded the vast majority of available benefits to the employee against National Fabco. The Administrative Law Judge also awarded the employee 10% permanent partial disability of the right wrist against Southern Equipment Company. National Fabco and Southern Equipment Company sought review of the Administrative Law Judge's Award.

On January 30, 2001 the Industrial Commission reversed the Award against Southern Equipment Company and ruled that Southern Equipment Company was not liable for any benefits under the last exposure rule. The Industrial Commission affirmed and modified the Award against National Fabco ruling that National Fabco was liable for all benefits under the last exposure rule. National Fabco appealed the Industrial Commission's Award to the Court of Appeals, Eastern District.

On October 9, 2001 the Court of Appeals, Eastern District affirmed the Industrial Commission's Award. An Order of Transfer to Missouri Supreme Court was issued in this case by the Court of Appeals, Eastern District on January 11, 2001 pursuant to Rule 83.02 upon Appellant's Motion for Rehearing and Alternative Application for Transfer. The Court of Appeals, Eastern District issued an Order of Transfer due to the conflict between the Eastern District and the Southern District regarding the application of the last exposure rule, the general interest and importance of this issue, and the need for re-examination of existing law on this issue pursuant to Rule 83.02.

STATEMENT OF FACTS

The employee worked as a layout assembler for Southern Equipment Company from October 8, 1952 through March 30, 1995 (T. 30-33). He was responsible for preparing blueprints, using a T-square and lifting A-frames (T. 30-33).

In the mid 1980's to early 1990's he noticed that his hands began to hurt (T. 30-34). His right hand first then later his left hand (T. 30-34). He noticed that his hands would fall asleep and tingle (T. 30-34). In 1989 or 1990 he injured his right shoulder while moving a die (T. 33). He did not pursue a worker-s compensation case out of the incident (T. 33). In 1990 the employee sought treatment with his hands with Dr. Delcau and Dr. Phillips (T. 34). On November 17, 1990 and November 30, 1990 Dr. Phillips and Dr. Petkovich respectively diagnosed bilateral carpal tunnel syndrome , right worse than left (T. 243,176). The Employee did not seek further treatment from 1991 through 1994 (T. 35). The employee did not file a claim against Southern Equipment Company (T. 33). The employee did not lose any time from work as a result of the condition while working at Southern Equipment Company (T. 33). The employee freely admitted that he never reported (neither verbally or written) a workers-compensation injury to his left hand, right hand or left shoulder while working at Southern Equipment Company (T. 33).

On April 17, 1995 he began work with a new company, Quipco Production in Illinois in a supervising position with the Company (T. 29). He worked for Quipco Production from April 17, 1995 through August 7, 1995 (T. 29).

On August 8, 1995 he began working for National Fabco doing the same job duties that he previously performed for Southern Equipment Company working eight hours a day, five days a week while using his right hand and left hand to prepare blueprints and drawing specifications using a pencil

and T-square (T. 37-49). He stopped working with National Fabco on March 3, 1997 and has not worked since that time (T. 23). He states that the job at National Fabco was exactly the same type of job and job duties that he performed at Southern Equipment.

He states that in December 1996 his Ahands got worse and he had to see somebody.@ (T. 34-35). The employee commenced treatment with Dr. Phillips (T 34-35). The employee testified that in December, 1996 Dr. Phillips said that the bilateral condition was work related (T. 38-39). On December 13, 1996, claimant, while employed at National Fabco, returned to Dr. Phillips because of his worsened condition (T.38). Dr. Phillips evaluated claimant and performed an EMG and nerve conduction study on December 13, 1996 (T. 250-255). The results showed a worsening of claimant=s condition (T. 250). Dr. Phillips referred claimant to an orthopedic surgeon (T. 250). Claimant spoke with his supervisor at National Fabco regarding the recommendation of Dr. Phillips and told his supervisor his condition was related to his employment (T. 38-39). Claimant=s supervisor sent claimant to Dr. Petkovich, an orthopedic surgeon (T. 39). On December 30, 1996 Dr. Petkovich diagnosed claimant with bilateral carpal tunnel syndrome and bilateral rotator cuff tendinitis (T. 257-258). Dr. Petkovich recommended claimant undergo carpal tunnel surgery (T. 257-258). On March 3, 1997 claimant was terminated from National Fabco three weeks prior to his planned retirement (T. 23-24). Prior to March 3, 1997 claimant had missed no time from work due to the symptoms in his hands, wrists and shoulders (T. 65). On March 12, 1997 the claimant filed a claim for compensation against Southern Quipco and National Fabco for injuries to Aboth hands, wrists, arms and body as a whole@ due to Arepetitive tasks@ during the course of his employment through March 3, 1997 (T. 333).

The employee treated with Dr. Benz (T. 44-45). Dr. Benz performed right carpal tunnel surgery on October 1, 1997, left carpal tunnel surgery on November 19, 1997 and left shoulder surgery on March 19, 1998 (T. 44-45). National Fabco, through their insurer, provided for these surgeries.

POINT RELIED ON

THIS HONORABLE COURT SHOULD AFFIRM THE COURT OF APPEALS, EASTERN DISTRICT=S DECISION AFFIRMING THE MISSOURI LABOR AND INDUSTRIAL COMMISSION=S AWARD AGAINST NATIONAL FABCO AS THE AWARD IS BASED UPON SUFFICIENT, COMPETENT EVIDENCE IN THE RECORD AND BY LAW NATIONAL FABCO IS THE LIABLE PARTY UNDER THE LAST EXPOSURE RULE OF THE MISSOURI WORKERS= COMPENSATION ACT

Section 287.063.2 of the Missouri Revised Statutes (1994)

Section 287.067.7 of the Missouri Revised Statutes (1994)

Johnson v. Denton Construction Company, 911 S.W.2d 287 (Mo.banc 1995)

Anderson v. Noel T. Adams Ambulance Dist., 931 S.W.2d 850 (Mo.App.W.D. 1996)

Arbeiter v. National Supermarkets, 990 S.W.2d 142 (Mo.App.E.D. 1999)

Cuba v. Jon Thomas Salons, Inc., 335 S.W.2d 542 (Mo.App.E.D. 2000)

STANDARD OF REVIEW

Sections 287.490 and 287.495**,** RSMo. (1994) provide that the reviewing court is restricted to matters of law and may modify, reverse, or remand for rehearing or set aside an Award upon four grounds only. They are as follows: that the Commission acted without or in excess of its power, that the Award was procured by fraud, that the facts found by the Commission do not support the Award, and that there was not sufficient, competent evidence in the record to warrant the making of the Award. Sections 287.490 and 287.495, RSMo. (1994).

ARGUMENT

THIS HONORABLE COURT SHOULD AFFIRM THE COURT OF APPEALS, EASTERN DISTRICT=S DECISION AFFIRMING THE MISSOURI LABOR AND INDUSTRIAL COMMISSION=S AWARD AGAINST NATIONAL FABCO AS THE AWARD IS BASED UPON SUFFICIENT, COMPETENT EVIDENCE IN THE RECORD AND BY LAW NATIONAL FABCO IS THE LIABLE PARTY UNDER THE LAST EXPOSURE RULE OF THE MISSOURI WORKERS= COMPENSATION ACT

Section 287.063.2 of the Missouri Revised Statutes states that Athe employer liable for the compensation...shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease for which the claim was made regardless of the length of time of such last exposure,@ Id. The last exposure rule is a rule of convenience in its application. Anderson v. Noel T. Adams Ambulance Dist., 931 S.W.2d 850, 853 (Mo.App.W.D. 1996). There is a three month rule exception found at 287.067.7 that is not applicable to the present case which will be discussed below. This honorable Court should affirm the Court of Appeals, Eastern District=s and the Industrial Commission=s finding that the employee was in the employment of National Fabco on August 8, 1995 through March 3, 1997 working in a position which exposed the employee to the hazards of the occupational disease to the right hand, left hand, left shoulder, for which claim is made. Therefore this honorable Court should affirm the Court of Appeals, Eastern District=s and the Industrial Commission=s finding that National Fabco Company is liable to the employee for all benefits awarded as a result of this repetitive trauma claim.

In Johnson v. Denton Construction Company, 911 S.W.2d 287 (Mo.banc 1995), the Supreme Court of Missouri ruled that Athe starting point in applying the last exposure rule is that the employer

liable for compensation is the last employer to expose the employee to the occupational hazard prior to the filing of the claim,@ Id. In this instance the liability would fall with National Fabco. This honorable Court should affirm the Court of Appeals, Eastern District=s and the Industrial Commission=s finding that the work the employee did at National Fabco significantly contributed to the employee=s condition of repetitive trauma injuries to the left hand, right hand and left shoulder. The Claim for Compensation was filed on March 12, 1997 at a time when National Fabco was the last exposure and for a time period much greater than three months.

There is an exception to the last exposure rule. The exception is commonly known as the three-month exception and is set out in Section 287.067.7 RSMo (1994). The exception states the following:

> With regard to occupational disease due to repetitive motion, if the exposure to the repetitive motion which is found to be the cause of the injury is for a period of less than three-months and the evidence demonstrates that the exposure to the repetitive motion with a prior employer was the substantial contributing factor to the injury, the prior employer shall be liable for such occupational disease. Id.

In order to determine whether Section 287.067.7 applies, we must determine whether there was a diagnosis of the occupational disease or claim made within the statutorily prescribed three-month period stated in the exception, that being the first three months of employment. See Arbeiter v. National Super Markets, Inc., 990 S.W.2d 142, 145-46 (Mo.App.E.D. 1999) and Cuba v. Jon Thomas Salons, Inc., 33 S.W.2d 542 (Mo.App.E.D. 2000). If it is determined no diagnosis or claim was made during this statutorily mandated three-month period, the exception does not apply and the date the claim was filed is controlling pursuant to the last exposure rule. Section 287.063 RSMo (1994).

In this case, claimant did not file a claim until after he had worked for National Fabco for almost two years. National Fabco, the last employer before the claim was filed, is presumed to be liable for

claimant=s claim pursuant to Section 287.063. There is no evidence claimant was diagnosed with carpal tunnel syndrome during the statutorily mandated three-month period (the first three months of employment with National Fabco) set forth in Section 287.067.7. Thus Section 287.067.7 does not apply and National Fabco is responsible for claimant=s claim pursuant to Section 287.063.

In regard to medical causation, the only expert evidence by Dr. Volarich indicates the employee=s repetitive trauma conditions to the left hand, right hand and right shoulder are medically causally related to his employment at National Fabco and that the employment at National Fabco was a substantial factor in the resulting conditions to the employee=s left wrist, right wrist, and left shoulder conditions. There is no other evidence of medical causation to suggest that any other party is liable on a medical causal basis for the employee=s claim.

National Fabco discusses the cases of Arbeiter v. National Supermarkets, 990 S.W.2d 142 (Mo.App.E.D. 1999) and Cuba v. Jon Thomas Salons, Inc., 335 S.W.2d 542 (Mo.App.E.D. 2000) in support of its position that National Fabco should not be liable for the claim. The Appellant=s reliance on the Arbeiter and Cuba cases is unfounded as Arbeiter and Cuba are Athree month rule@ exception cases which are not applicable to the facts of this case. In Arbeiter and Cuba the Athree month rule@ exception under Section 287.067.7 RSMo. (1994) was discussed and indicates that the starting point for determining liability in a Athree month rule case@ would be the date of diagnosis. This is not the case at hand as National Fabco provided the last exposure for a time period much greater than three months at the time of the filing of the claim on March 12, 1997. Therefore the Arbeiter and Cuba cases do not support the Appellant=s position and this honorable Court=s decision should not be influenced by Appellant=s misinterpretation of these cases. Furthermore, Arbeiter and Cuba are in no way in conflict with the Court of Appeals, Eastern District=s decision in this matter, to the contrary the Court of Appeals, Eastern District properly cite Johnson, Arbeiter, and Cuba in support of their decision in this

case and in their Order of Transfer.

The Missouri Supreme Court case of Johnson v. Denton Construction Company, 911 S.W.2d 287 (Mo.banc 1995) is controlling and clearly defines the correct interpretation of the last exposure rule by stating a bright line test as follows, the employer/insurer who is liable is the employer/insurer whose employment last exposed the employee to the hazard of the occupational disease for which claim is made regardless of the length of time of such exposure. Section 287.063.2 (RSMo 1994). In this instance the law dictates that National Fabco Company is the liable employer.

CONCLUSION

Based on the foregoing this honorable Court should affirm the decision of the Court of Appeals, Eastern District and the Industrial Commission=s Award finding that National Fabco is the employer who is liable for all compensation awarded to the employee under the last exposure rule.

Respectfully submitted by,

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CERTIFICATE OF COMPLIANCE

I, John P. Kafoury, Suite 400, Pennsylvania Building, 217 North Tenth Street, St. Louis, MO 63101, Bar No. 41015 swear that this Brief complies with the page limits of Rule 84.06 Rule 360 and Special Rule No. 1 of the Missouri Rules of Civil Procedure, that there is a total of 2776 words, and that the disk has been scanned for viruses and is virus-free.

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John P. Kafoury

CERTIFICATE OF SERVICE

Two copies of the foregoing are being mailed on this 4th day of March, 2002 to Mr. Dean L. Christianson, Attorney at Law, 1221 Locust St., Second Floor, St. Louis, Missouri 63103, Mr. Mark Cordes, Attorney at Law, 200 N. Broadway, Suite 700, St. Louis, MO 63102, Mr. Lynn Barnett, Attorney at Law, 906 Olive Street, Suite 400, St. Louis, MO 63101, Mr. Stephen McManus, Attorney at Law, 515 Olive, Suite 1501, St. Louis, Mo 63101, and Ms. Heidi Brown, Attorney at Law, 1015 Locust, Suite 500, St. Louis, MO 63101, Mr. Patrick McHugh, 515 N. 6th Street, 24th Floor, St. Louis, MO 63101, Ms. Marcia Hahalis, Asst. Attorney General, 720 Olive Street, Suite 2000, St. Louis, MO 63101.

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